

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CORA DISNEY,

3:16-CV-00424-BR

Plaintiff,

OPINION AND ORDER

v.

CAROLYN W. COLVIN,
Commissioner, Social Security
Administration,

Defendant.

GEORGE J. WALL
1336 E. Burnside
Suite 130
Portland, OR 97214
(503) 236-0068

Attorney for Plaintiff

BILLY J. WILLIAMS
Acting United States Attorney
JANICE E. HEBERT
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204-2902
(503) 727-1003

DAVID MORADO

Regional Chief Counsel

LISA GOLDOFTAS

Special Assistant United States Attorney

Social Security Administration

701 Fifth Avenue, Suite 2900

Seattle, WA 98104

(206) 615-3858

Attorneys for Defendant

BROWN, Judge.

Plaintiff Cora Disney seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which she denied Plaintiff's application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **AFFIRMS** the decision of the Commissioner and **DISMISSES** this matter.

ADMINISTRATIVE HISTORY

Plaintiff filed an application for SSI on October 16, 2007, and alleged a disability onset date of July 1, 1984. Tr. 21.¹ Her application was denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a hearing on May 5, 2010. Tr. 57. At the hearing Plaintiff and a vocational expert (VE)

¹ Citations to the official transcript of record filed by the Commissioner on July 12, 2016, are referred to as "Tr."

testified. Plaintiff was represented by an attorney.

On August 5, 2010, the ALJ issued an opinion in which he found Plaintiff was not disabled and, therefore, was not entitled to benefits. Tr. 57-71. At some point that decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review. Tr. 21. See *Sims v. Apfel*, 530 U.S. 103, 106-07 (2000).

Plaintiff filed a second application for SSI on July 23, 2011, and alleged a disability onset date of July 1, 1984. Tr. 86. Her application was denied initially and on reconsideration. An ALJ held a hearing on August 6, 2014. Tr. 37-53. At the hearing Plaintiff and a VE testified. Plaintiff was represented by an attorney.

On September 11, 2014, the ALJ issued an opinion in which he found Plaintiff was not disabled and, therefore, was not entitled to benefits. Tr. 21-31. On January 20, 2016, that decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review. Tr. 1-7.

At some point Plaintiff filed a third application for SSI. The SSA approved Plaintiff's third application finding her disabled from March 10, 2016, forward. Accordingly, in this action Plaintiff challenges the Commissioner's finding that she was not disabled for the closed period of May 31, 2013, through the date of the second ALJ's decision on September 11, 2014.

BACKGROUND

Plaintiff was born on May 31, 1963, and was 50 years old at the time of the 2014 hearing. Tr. 86. Plaintiff has an eighth-grade education. Tr. 41. She does not have any past relevant work experience. Tr. 30.

Plaintiff alleges disability due to post-traumatic stress disorder (PTSD), a back injury, "mental health issues," and multiple personalities. Tr. 86.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 24-25, 27-29.

STANDARDS

The initial burden of proof rests on the claimant to establish disability. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The ALJ must develop the record when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence. *McLeod v. Astrue*, 640 F.3d

881, 885 (9th Cir. 2011) (quoting *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Molina*, 674 F.3d. at 1110-11 (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). It is more than a mere scintilla [of evidence] but less than a preponderance. *Id.* (citing *Valentine*, 574 F.3d at 690).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even when the evidence is susceptible to more than one rational interpretation, the court must uphold the Commissioner's findings if they are supported by inferences reasonably drawn from the record. *Ludwig v. Astrue*, 681 F.3d 1047, 1051 (9th Cir. 2012). The court may not substitute its judgment for that of the

Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9th Cir. 2006).

DISABILITY ANALYSIS

I. The Regulatory Sequential Evaluation

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). See also 20 C.F.R. § 416.920. Each step is potentially dispositive.

At Step One the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). See also *Keyser v. Comm'r of Soc. Sec.*, 648 F.3d 721, 724 (9th Cir. 2011).

At Step Two the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. 20 C.F.R. § 416.920(c). See also *Keyser*, 648 F.3d at 724.

At Step Three the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of a number of listed impairments that the Commissioner acknowledges are so severe they preclude substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). See also *Keyser*, 648 F.3d at 724. The criteria for the listed impairments, known as Listings, are

enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, she must assess the claimant's Residual Functional Capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 416.945(a). See also Social Security Ruling (SSR) 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at *1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234-35 (9th Cir. 2011) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

At Step Four the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. 20 C.F.R. § 416.920(a)(4)(iv). See also *Keyser*, 648 F.3d at 724.

If the Commissioner reaches Step Five, she must determine whether the claimant is able to do any other work that exists in the national economy. 20 C.F.R. § 416.920(a)(4)(v). See also *Keyser*, 648 F.3d at 724. Here the burden shifts to the Commissioner to show a significant number of jobs exist in the national economy that the claimant can perform. *Lockwood v.*

Comm'r Soc. Sec. Admin., 616 F.3d 1068, 1071 (9th Cir. 2010).

The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 416.920(g)(1).

ALJ'S FINDINGS

At Step One the ALJ found Plaintiff has not engaged in substantial gainful activity since her July 23, 2012, application date. Tr. 24.

At Step Two the ALJ found Plaintiff has the severe impairments of dysthymic disorder; borderline intellectual functioning; alcohol, methamphetamine, and heroin dependence in remission; degenerative disc disease of the spine; and degenerative joint disease of the knee. Tr. 24.

At Step Three the ALJ concluded Plaintiff's impairments do not meet or equal the criteria for any Listed Impairment from 20 C.F.R. part 404, subpart P, appendix 1. The ALJ found Plaintiff has the RFC to perform light work "except she can stand and/or walk for four hours in an eight-hour day." Tr. 26. The ALJ found Plaintiff can occasionally balance, stoop, kneel, crouch, crawl, climb ladders and stairs, and have contact with the public. The ALJ found Plaintiff cannot climb ladders, ropes, or

scaffolds. The ALJ also found Plaintiff "can perform simple, entry-level work and cannot perform work that requires written instructions or written reports." Tr. 26.

At Step Four the ALJ concluded Plaintiff does not have any past relevant work. Tr. 30.

At Step Five the ALJ found Plaintiff can perform jobs that exist in significant numbers in the national economy. Tr. 30. Accordingly, the ALJ found Plaintiff is not disabled.

DISCUSSION

Plaintiff contends the ALJ erred when he (1) failed to find at Step Two that Plaintiff's obesity is a severe impairment, (2) failed to find at Step Two that Plaintiff's reading limitation is a severe impairment, and (3) partially rejected Plaintiff's Adult Function Report. Plaintiff also contends the Appeals Council erred when it concluded the opinion of treating physician, Peter Hatcher, M.D., did not provide a basis to review the ALJ's decision.

I. The ALJ did not err at Step Two

At Step Two the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii). A severe impairment "significantly limits" a claimant's "physical

or mental ability to do basic work activities." 20 C.F.R. § 404.1521(a). See also *Ukolov*, 420 F.3d at 1003. The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(a), (b). Plaintiff has the burden at Step Two to establish the existence of a severe impairment and to show any error is harmful.

The Ninth Circuit has held when the ALJ has resolved Step Two in a claimant's favor, any error in designating specific impairments as severe at Step Two does not prejudice a claimant if the ALJ considered the impairments when formulating his assessment of Plaintiff's RFC. *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (any error in omitting an impairment from the severe impairments identified at Step Two was harmless when Step Two was resolved in claimant's favor).

A. Obesity

Plaintiff asserts the ALJ erred at Step Two when he failed to find Plaintiff's obesity is a severe impairment.

Plaintiff notes she has gained weight since the ALJ's decision in 2010. In August 2014 Plaintiff's knee surgeon noted Plaintiff is morbidly obese with a body mass index of 45.37. Tr. 598. The ALJ specifically considered Plaintiff's obesity and noted the record did not indicate it was a severe impairment. In addition, the record contains few references to Plaintiff's

obesity and does not include any opinion by a medical professional that Plaintiff's obesity caused significant limitations in her ability to work.

The Court, therefore, concludes on this record that the ALJ did not err when he failed to find at Step Two that Plaintiff's obesity is a severe impairment.

B. Reading Limitation

Plaintiff also alleges the ALJ erred at Step Two when he failed to find her reading limitation is a severe impairment. Plaintiff, however, does not point to any objective evidence in the record to support her assertion that she has a reading limitation that significantly limitation her ability to work. In addition, the record does not contain any opinion by a medical or nonmedical treating source that Plaintiff suffers from a severe reading limitation. Moreover, Plaintiff testified at the 2014 hearing that she is able to read a newspaper, that she completed eighth grade, and that she is able to read a grade level. Tr. 42.

The Court, therefore, concludes on this record that the ALJ did not err when he failed to find at Step Two that Plaintiff's reading limitation is a severe impairment.

II. The ALJ did not err when he partially rejected Plaintiff's Adult Function Report.

Plaintiff alleges the ALJ erred by failing to provide clear and convincing reasons for partially rejecting Plaintiff's

September 9, 2012, Adult Function Report.

In *Cotton v. Bowen* the Ninth Circuit established two requirements for a claimant to present credible symptom testimony: The claimant must produce objective medical evidence of an impairment or impairments, and she must show the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. *Cotton*, 799 F.2d 1403 (9th Cir. 1986), *aff'd in Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991). The claimant, however, need not produce objective medical evidence of the actual symptoms or their severity. *Smolen*, 80 F.3d at 1284.

If the claimant satisfies the above test and there is not any affirmative evidence of malingering, the ALJ can reject the claimant's pain testimony only if he provides clear and convincing reasons for doing so. *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (citing *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)). General assertions that the claimant's testimony is not credible are insufficient. *Id.* The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834).

In her Adult Function Report Plaintiff stated her daily routine includes making her bed, making meals, cleaning, and looking for work. Tr. 206. Plaintiff indicated she does not have any problems with self-care but she "stays home more often

due to medical condition." Tr. 205. Plaintiff noted she is able to wash dishes, clean, and vacuum, but doing those things takes her all day and she can no longer walk for a mile or "stand for hours." Tr. 206-7. Plaintiff stated she is able to use public transportation, to pay bills, to count change, and to use checks or money orders. Tr. 208. Plaintiff indicated she "can't read, walk, [or] stand" since she began suffering from her impairments. Plaintiff stated her conditions affect her ability to complete tasks, to concentrate, to understand, and to remember things. Tr. 210. Plaintiff stated she can walk a block before needing to stop and rest for five-to-ten minutes, her ability to concentrate "depends on topic of environment," and she can sometimes follow spoken instructions. Tr. 210.

The ALJ found Plaintiff's "medically determinable impairments could reasonably be expected to cause some symptoms," but Plaintiff's "statements concerning the intensity, persistence and limiting effects of [her] symptoms are not entirely credible." Tr. 27. The ALJ noted the record documented a history of Plaintiff's complaints about pain with "minimal objective findings." Tr. 27. For example, Plaintiff's back surgeries occurred approximately 20 years before the ALJ's 2014 decision. Plaintiff was placed on a chronic pain-management regimen, was weaned off narcotics in April 2011, and was prescribed amitriptyline in August 2011. Tr. 307. Plaintiff,

however, did not receive any treatment for her back pain after she filed her application for SSI in July 2012. Tr. 28. The ALJ also noted Plaintiff reported to urgent care in July 2014 with left knee pain after a slip and fall. The ALJ noted Plaintiff was scheduled to have left-knee surgery on August 11, 2014, and her doctor reported the typical recovery time was six-to-eight weeks. The ALJ noted the evidence relating to Plaintiff's alleged mental-health impairments is "scant," and Plaintiff testified she has not received mental-health treatment since 2012. The record also reflects normal mental-status examination findings during the relevant period. Tr. 522.

The ALJ found Plaintiff's activities of daily living suggest greater functioning than Plaintiff alleges. As noted, Plaintiff reports she is able to perform all of her personal care herself, to make simple meals, to do household chores, to use public transportation, to shop, and to attend Alcoholics Anonymous meetings. In addition, although Plaintiff stated in her Adult Function Report that she cannot read, she testified at the hearing that she completed eighth grade, reads at grade level, and can read the newspaper.

On this record the Court finds the ALJ provided clear and convincing reasons supported by substantial evidence in the record for finding Plaintiff's Adult Function Report was only partially credible. The Court, therefore, concludes the ALJ did

not err when he partially rejected Plaintiff's statement.

III. The Appeals Council did not err when it concluded Dr. Hatcher's opinion did not provide a basis to review the ALJ's decision.

On May 19, 2015, almost nine months after the hearing and eight months after the ALJ issued his opinion, Dr. Hatcher wrote a letter in which he noted he has been Plaintiff's primary care physician since November 2014. Dr. Hatcher stated it was his medical opinion that Plaintiff

will not be able to ambulate effectively within the next 12 months due [to] her diagnosis of severe osteoarthritis of the knee. Despite partial knee replacement surgery on each knee in the last 12 months, [Plaintiff's] recovery has been poor, her balance and mobility are severely compromised and her rehabilitation prospects are poor. Because of ongoing and severe pain in her knee . . . [Plaintiff] is bound to a wheelchair and reliant on caregivers to get around.

[Plaintiff's] high level of pain and fatigue inhibits her ability to focus or function at a normal level. Her knee arthritis, rotator cuff tear and her marked psychiatric difficulties as well prevent her from being able to work at this time. [Plaintiff] is unable to lift more than 5 pounds, and can only lift 5 pounds occasionally. [Plaintiff] is unable to push her wheelchair on her own or complete physically demanding tasks.

Pl.'s Brief, Ex. 1 at 2.

Plaintiff submitted Dr. Hatcher's letter to the Appeals Council in June 2015.

On January 20, 2016, the Appeals Council denied Plaintiff's request for review of the ALJ's decision. In its denial the Appeals Council noted it had reviewed Dr. Hatcher's letter but

concluded it did "not affect [the ALJ's] decision about whether you were disabled beginning on or before September 11, 2014, because the information in the letter "was about a later time." Tr. 2.

The Ninth Circuit has held

when a claimant submits evidence for the first time to the Appeals Council, which considers the evidence in denying review of the ALJ's decision, the new evidence is part of the administrative record, which the district court must consider in determining whether the Commissioner's decision is supported by substantial evidence.

Brewes, 682 F.3d at 1159-60.

Plaintiff asserts Dr. Hatcher's May 2015 opinion establishes the Commissioner's decision was not based on substantial evidence in the record. Defendant, on the other hand, contends Dr. Hatcher's opinion does not establish that Plaintiff suffered a severe medically determinable impairment lasting for at least 12 months during the relevant period, and, therefore, Dr. Hatcher's opinion fails to establish that the Commissioner's decision was not supported by substantial evidence in the record.

Defendant asserts Dr. Hatcher's opinion was not retrospective, and he did not address the relevant period ending September 11, 2014. Defendant points out that Dr. Hatcher's May 2015 letter specifically discusses Plaintiff's ability "to ambulate effectively within the next 12 months." Emphasis added. Similarly, Dr. Hatcher opined Plaintiff is "unable to work at

this time" (i.e., May 2015). In addition, Dr. Hatcher's opinions and evaluation in the letter are all written in the present tense and, therefore, reference Plaintiff's restrictions as of May 2015. Although Dr. Hatcher notes he is "familiar with our care of [Plaintiff] since 2010 when she established care at the Multnomah County Health Department," Dr. Hatcher was not Plaintiff's treating physician until November 2014, which is after the relevant period.

As noted, the initial burden of proof rests on the claimant to establish disability. *Molina*, 674 F.3d at 1110. To meet this burden, Plaintiff must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Court concludes Dr. Hatcher's May 2015 opinion does not establish Plaintiff suffered a severe medically determinable impairment lasting for at least 12 months during the relevant period. The Court, therefore, concludes the newly-submitted evidence fails to establish that the Commissioner's decision was not supported by substantial evidence in the record.

CONCLUSION

For these reasons, the Court **AFFIRMS** the decision of the

Commissioner and **DISMISSES** this matter.

IT IS SO ORDERED.

DATED this 10th day of February, 2017.

A handwritten signature in cursive script, appearing to read "Anna J. Brown", written in black ink.

ANNA J. BROWN
United States District Judge